

pers. comm. 2001). Nevertheless, if we were to consult on a proposed BLM energy-related action, the outcome of that consultation likely would not differ from the BLM's policy of not allowing oil and gas development within the 100-year floodplain. For these reasons, we do not anticipate that this rule will be a significant regulatory action under Executive Order 12866, and it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

#### **Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)**

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

1. On the basis of information contained in the Economic Analysis, this rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that any of their actions involving Federal funding or authorization must not destroy or adversely modify the critical habitat or take the species under section 9.

2. This rule will not produce a Federal mandate of \$100 million or greater in any year (*i.e.*, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act).

#### **Takings**

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights," March 18, 1988; 53 FR 8859), we have analyzed the potential takings implications of the designation of critical habitat for the silvery minnow. The takings implications assessment concludes that this final rule does not pose significant takings implications. A copy of this assessment can be obtained by contacting the New Mexico Ecological Services Field Office (*see ADDRESSES* section).

On the basis of the above assessment, we find that this final rule designating critical habitat for the silvery minnow does not pose significant takings implications.

#### **Federalism**

In accordance with Executive Order 13132, we have considered whether this rule has significant Federalism effects and have determined that a Federalism assessment is not required. In keeping with Department of the Interior policy, we requested information from and coordinated development of this final

rule with appropriate resource agencies in NM and TX (*i.e.*, during the EIS scoping period and proposed rule comment period). We will continue to coordinate with the appropriate agencies.

We do not anticipate that this regulation will intrude on State policy or administration, change the role of the Federal or State government, or affect fiscal capacity. We have conducted two formal section 7 consultations with the Corps and BOR, and a non-Federal agency (MRGCD) over actions related to water operations on the middle Rio Grande (Service 2001b, 2002a). As a result, we do not believe that this designation of critical habitat will have significant Federalism effects. For example, in the recent formal section 7 consultations, the MRGCD's regulatory burden requirement was only affected to the extent that the MRGCD was acting as the United States' agent for the operation and maintenance of facilities. Federal agencies also must ensure, through section 7 consultation with us, that their activities do not destroy or adversely modify designated critical habitat. Nevertheless, we do not anticipate that the amount of supplemental instream flow, provided by past consultations (*e.g.*, Service 2001b), will increase because an area is designated as critical habitat. This rule also will not change the appropriation of water rights within the area designated as critical habitat. For these reasons, we do not anticipate that the designation of critical habitat will change State policy or administration, change the role of the Federal or State government, or affect fiscal capacity.

Within the 300-ft (91.4-m) lateral width, designation of critical habitat could trigger additional review of Federal activities under section 7 of the Act, and may result in additional requirements on Federal activities to avoid destroying or adversely modifying critical habitat. Any action that lacked Federal involvement would not be affected by the critical habitat designation. Should a Federally funded, permitted, or implemented project be proposed that may affect designated critical habitat, we will work with the Federal action agency and any applicant, through section 7 consultation, to identify ways to implement the proposed project while minimizing or avoiding any adverse effect to the species or critical habitat. In our experience, the vast majority of such projects can be successfully implemented with, at most, minor changes that avoid significant economic impacts to project proponents.

The designation may have some benefit to these governments—the areas essential to the conservation of the species would be clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species would be identified. While this definition and identification does not alter where and what Federally sponsored activities may occur, it may assist these local governments in long-range planning (where otherwise they would wait for case-by-case section 7 consultations to occur).

#### **Civil Justice Reform**

In accordance with Executive Order 12988 (February 7, 1996; 61 FR 4729), the Office of the Solicitor has determined that this rule would not unduly burden the judicial system and would meet the requirements of sections 3(a) and 3(b)(2) of the Order. We designate critical habitat in accordance with the provisions of the Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the silvery minnow.

#### **Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)**

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### **National Environmental Policy Act**

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the Ninth Circuit *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 698 (1996). However, when the range of the species includes States within the Tenth Circuit, such as that of the silvery minnow, pursuant to the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA